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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-848

THOMAS U. GREER, Commander,
Fort Dix Military Reservation, *et al.*,
Petitioners,

—v.—

BENJAMIN SPOCK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *AMICI CURIAE*

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Brief of the American Civil Liberties Union and American Civil Liberties Union of New Jersey, *Amici Curiae*

Interest of Amici [1/]

1/ Letters from the parties, consenting to the filing of this brief, have been filed with the Clerk of the Court.

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 250,000 members dedicated solely to protection of the Bill of Rights. The American Civil Liberties Union of New Jersey is the New Jersey affiliate of the ACLU, defending civil liberties in the State of New Jersey where this action arose. In its fifty-five year existence, the ACLU has defended the First Amendment rights of speech, press, assembly and petition, on behalf of civilians and members of our armed forces alike. Indeed, in many of the previous cases bearing upon the issues here, the ACLU has provided counsel to represent persons whose First Amendment rights had been infringed by military rules and regulations. As in those cases, the issues here involve competing claims of freedom of expression and military necessity. This brief is intended to assist the Court in resolving those varying claims.

Introductory Statement

This case involves the important issue of civilian access to portions of a military post generally open to the public, for purposes of communicating information to the occupants. First Amendment rights of free expression, of access to an audience, and to receive information are all at stake.

Fort Dix Military Reservation composes 55 square miles in a rural setting 18 miles from Trenton, New Jersey. It is occupied by approximately 15,000 servicemen, 6,080

civilians in family units, and (during working hours) 2,600 civilian employees. It is traversed by 10 roads, all of which have unrestricted vehicular and pedestrian traffic, with a 1970 count of 66,000 daily vehicles. Spock v. David, 469 F.2d 1047, 1053-54 (3d Cir. 1972). There are no check points or barriers to entrance.

Respondents here are citizens who wished to distribute leaflets on portions of the post, and a candidate for national political office who wished to conduct a rally and make a political speech on some appropriate site within the post. (See Pet. App. 2a.) They were impeded by two Fort Dix regulations -- 210-27, ¶3 and 210-26, ¶2(a). The former imposes a prior restraint by requiring authorization for distribution of any literature anywhere on the Fort Dix reservation, and the latter absolutely bans the conduct of a political demonstration on army property. The constitutionality of these two regulations -- both on their face and as applied -- is in issue.

The Third Circuit Court of Appeals concluded that both regulations violated the First Amendment. Spock v. David, supra. Upon remand, the district court entered an injunction against petitioners, an order barring interference with political campaigning and the distribution of literature "within areas where the public has open access to Fort Dix." (Pet.App. 42a-45a). This order was expressly made subject to necessary restrictions on the time, place,

or manner of the expressive activities allowed. (Ibid.) The Third Circuit affirmed. 502 F.2d 953 (3rd Cir. 1974).

Some emphasis on the factual background is appropriate. Respondents were intent on exercising First Amendment rights in their most pristine and classic form -- oral address and distribution of handbills. There was no intention to interfere with military operations or personnel. No actual interference took place. There was no effort to impose a message on a disinterested or captive audience; all prospective hearers were free to ignore the respondents' communications. Fort Dix was an open post, and respondents sought and received access only to portions of the post generally available and open to the public.

Summary of Argument

I.

Fort Dix regulation 210-27 ¶3(a), which requires prior command approval for the "distribution or posting of any publication," cannot constitutionally be applied to those portions of the base which are generally open and accessible to the public. Even where government property is primarily dedicated to uses and functions unrelated to expression or communication, so long as the location is generally open to the public, First Amendment activity which does not interfere excessively with the primary use of the area cannot be prohibited. Edwards

v. South Carolina, 372 U.S. 229 (1963); Brown v. Louisiana, 383 U.S. 131 (1966); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). These principles apply with the same force to the public areas of military installations and property. Flower v. United States, 407 U.S. 197 (1972); United States v. Gourley, 502 F.2d 785 (10th Cir. 1974); Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973).

II.

The Fort Dix regulation requiring command approval for distribution of any publication embodies a facially defective system of prior restraints which cannot overcome the heavy presumption against its constitutional validity, New York Times v. United States, 403 U.S. 713 (1971); Southeastern Promotions, Ltd. v. Conrad, ____ U.S. ____, 95 Sup. Ct. 1239, 43 L.Ed. 2d 448 (1975), even in the context of communications to and by military personnel. See, Parker v. Levy, 417 U.S. 733 (1974). The operative terms of this prior restraint system -- "a clear danger to the loyalty, discipline, or morale of troops" -- lack the precision and clarity sufficient to guide the censor and are far too sweeping in their prohibition. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); United States v. Priest, 21 USCMA 564, 45 CMR 338 (1972). Similarly, the regulatory arrangement is entirely lacking in the procedural safeguards that any prior restraint scheme must provide. Southeastern Promotions, Ltd.

v. Conrad, supra.

III.

Fort Dix regulation 210-26 ¶2(a), forbidding all "demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" from taking place on the installation, violates the First Amendment which requires that suitable public areas be available for orderly communication and expression. Police Department, City of Chicago v. Mosley, 408 U.S. 92 (1972); Tinker v. Des Moines Independent Community School District, supra. The army's political neutrality would not be threatened by an even-handed policy permitting access to appropriate public areas of Fort Dix. Indeed, such an even-handed policy is constitutionally required. Allowing such First Amendment activities to take place on the portions of the base open and accessible to the public will not intrude upon the concerns for protecting the captive audience which were identified in Lehman v. City of Shaker Heights, 418 U. S. 298 (1974).

Argument

I.

FORT DIX REGULATION 210-27 ¶3(a) CANNOT CONSTITUTIONALLY BE APPLIED TO THE PORTIONS OF FORT DIX WHICH ARE GENERALLY OPEN AND ACCESSIBLE TO THE PUBLIC.

Fort Dix Regulation 210-27 ¶3(a) reads, in relevant part:

> The distribution or posting of any publication...is prohibited on the Fort Dix Military Reservation without prior written approval....

Whatever the Court's determination may be concerning the facial validity of this provision, see Point II, infra, the prior restraint embodied in this regulation cannot be applied on "open" areas of Fort Dix. Such areas constitute an appropriate public forum on which non-intrusive first amendment activity such as leafletting cannot be impeded by a prior restraint. Flower v. United States, 407 U.S. 197 (1972).

Even though governmental property may be primarily dedicated to functions unrelated to expression, its use for non-intrusive expression is constitutionally required so long as the locale is generally available to the public and so long as the expressive activity will not interfere excessively with the primary governmental use. See Brown v. Louisiana, 383 U.S. 131 (1966) (library); Edwards v. South Carolina, 372 U.S. 229 (1963) (state house); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (school); Grayned v. City of Rockford, 408 U.S. 104, 120 (1972). This Court has already determined that a blanket prior restraint cannot

be applied to an entire area just because it is denominated a military reservation. See Flower v. United States, 407 U.S. 197 (1972). In Flower, a prior restraint regulation and a "bar order" were held invalid as applied to a civilian distributing literature on a street in Fort Sam Houston which was generally accessible to the public. Id. at 198. Some portions of an "open" military post must be available to leafletting and the like without the burden of prior restraint.

Petitioners seek to distinguish Flower on two grounds: first, that the military streets at Fort Sam Houston were somehow more open to the non-military public than the streets at Fort Dix, and second, that Flower does not establish the rule that publically accessible areas of military reservations are appropriate places for First Amendment activity. The first contention is undermined by the record; the second by recent decisions.

Petitioners seek to distinguish Flower on the basis that the roads in Fort Dix are patrolled, or to restrict Flower narrowly to streets or roads. There can be no question that, patrols or not, Fort Dix is an "open" post within the meaning of Flower. Fort Dix is traversed by 10 paved roads including a major state highway. While these roads may be "patrolled," they are open to unrestricted vehicular and pedestrian traffic; there are no barriers or screenings to impede entrants. See Spock

v. David, 469 F.2d 1047, 1053-54 (3d Cir. 1972). A 1970 daily vehicle count registered 66,000 vehicles. Id. at 1054. There are few restricted areas on the post. Civilians are welcome as visitors to personnel and as tourists. Ibid. On one recent occasion, the post hosted 100,000 visitors during a two-day celebration of the Army's bicentennial. Newark Star Ledger, June 16, 1975, p. 8, col. 6. Public access to Fort Dix is thus essentially unrestricted.

Nor can Flower's proscription on prior restraints be limited to "streets" within the post. While streets, as public thoroughfares, may be the most appropriate locus for expressive activity, many other public facilities are suitable for expression closely akin to pure speech (e.g., handbilling); such locales must be permitted to be used for expression. Brown v. Louisiana, supra; Edwards v. South Carolina, supra; Tinker v. Des Moines Independent Community School District, supra. General public accessibility to the particular locale, and non-disruption of governmental functions, are the keys. Within an open post like Fort Dix there are numerous areas where non-intrusive expression is appropriate. These include the post exchanges, family housing areas, movie theaters, and commissaries. (See Pet. App. 36a). Flower clearly dictates access by pamphleteers to public thoroughfares on an open military reservation. And the Court's rationale there applies equally to the post areas listed above which are unre-

stricted and eminently suitable for non-intrusive expressive activity. There is simply no reason in principle to restrict access to ideas and communications to "the streets." Cf. Grayned v. City of Rockford, supra, 408 U.S. at 120.

Subsequent cases have confirmed that Flower cannot be confined to streets and roads. See United States v. Gourley, 502 F.2d 785 (10th Cir. 1974); Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973); CCCO Western Region v. Fellows, 359 F.Supp. 644 (N.D. Calif. 1972); Jenness v. Forbes, 351 F.Supp. 88 (D.R.I. 1972). In Gourley, the 10th Circuit ruled that portions of the Air Force Academy generally open to the public,[2/] such as the stadium and chapel areas, must be available to civilians for expressive purposes. Relying upon Flower, the court commented:

> [W]hen the commander permits portions of the installation to be open to the general public, and visitors are encouraged, he may not restrict an individual's

2/ The Academy was found to be an open post even though its entrances were manned around the clock by sentries. 502 F.2d at 787. This closing was deemed "ritualistic" since no substantial stopping or checking was actually made of visitors during daylight hours. Id. at 787-88.

> exercise of his First Amendment rights in such public areas. 502 F.2d at 787.

In Burnett, the Fourth Circuit, citing Flower, stated that where a military reservation is open to the public, "civilians have an unqualified right to enter such public areas and to exercise their constitutionally protected freedom of expression...." 474 F.2d at 880. The court added: "Where the area of the base involved is one open to the public, the base commander has no discretion, but instead a ministerial duty to allow peaceful leafletting regardless of the views sought to be expressed." Id. at 882. That case dealt with Fort Bragg, North Carolina. CCCO spoke to the Presidio in San Francisco, with the court reaching a similar conclusion. In Jenness, the district court held that a prior restraint regulation could not be applied in housing areas of the Quonset Naval Air Station, Rhode Island. 351 F. Supp. at 95-96. In all of these cases, the courts stressed the accessibility of open post areas to the public, and the absence of any disruption to military functions stemming from peaceful, non-intrusive expression in such areas. Cf. Chicago Area Military Project v. City of Chicago, 508 F. 2d 921 (7th Cir. 1975) (opening up public areas of an airport for expressive activity) and Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2d Cir. 1974) cert. denied, 419 U.S. 838 (1974) (permitting leafletting on public waiting areas within a state welfare center).

Reasonable limitations upon time, place, and manner may of course be imposed in order to prevent interference with on-going governmental activities. See Grayned v. City of Rockford, supra, 408 U.S. at 116; Albany Welfare Rights Organization, supra, 493 F.2d at 1324-25. The district court's injunction in this case specifically provided for such limitations. (Pet. App. 45a). But a broad prior restraint, screening the content of expression on all portions of a federal military reservation, cannot be constitutionally tolerated.

II.

FORT DIX REGULATION 210-27 ¶3(a) IS, ON ITS FACE, CONSTITUTIONALLY DEFECTIVE IN FAILING TO PROVIDE A NARROW AND PRECISE STANDARD FOR SCREENING PUBLICATIONS AND IN FAILING TO PROVIDE PROPER PROCEDURAL SAFEGUARDS FOR A PRIOR RESTRAINT.

Fort Dix Regulation 210-27 ¶3 indicates that the Post Commander will screen in advance, and can suppress, any publication. It reads, in relevant part: "The distribution or posting of any publication, . . .is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General."

On its face, this provision offers no standard for the prior screening of written materials. There are, however, supplementary sources which purport to limit a commander's discretion in implementing this prior restraint. Army Regulation 210-10,

¶5-5 contains the following language:

> If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may...delay the distribution of any publication which he considers undesirable, on property subject to his control.

Department of Defense Directive 1325.6 (1969) reiterates the "clear danger to the loyalty, discipline, or morale of military personnel" standard. See Note, 73 Colum. L. Rev. 1089, 1091-99 (1973). According to that directive, the fact that a publication is "critical -- even unfairly critical -- of government policies or officials is not, in itself, a ground for denial." (Emphasis added). See Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970) cert. denied, 401 U.S. 982 (1971); Schneider v. Laird, 453 F.2d 345 (10th Cir. 1972) cert. denied, 407 U.S. 914 (1974). In short, the government does not contend that a military post is inappropriate for expressive activity. It insists on screening in advance the content of every publication to be circulated on any part of this open post, Fort Dix.

Venerable doctrine establishes that any system of prior restraint bears a heavy presumption against its constitutionality. See, e.g., Southeastern Promotions Ltd. v.

Conrad, __ U.S. __, 95 Sup.Ct. 1239, 43 L.Ed. 2d 448 (1975); New York Times v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415(1971); Saia v. New York, 334 U.S. 558 (1948); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. State, 308 U.S. 147 (1939). A principal objective of the First Amendment was elimination of prior restraints under which government officials could control, in advance, the dissemination of views. The fear is that the government censor will impede and delay expression of views found to be annoying. Saia v. New York, supra, 334 U.S. at 560-63; Cox v. Louisiana, 379 U.S. 559, 593 (1965). "Because of their potential use as instruments for selectively suppressing some points of view, this Court has condemned licensing schemes which lodge broad discretion in a public official to permit speech related activity." Police Department, City of Chicago v. Mosley, 408 U.S. 92, 97 (1972). "(A) free society prefers to punish the few who abuse rights of speech after they breach the law." Southeastern Promotions, Ltd. v. Conrad, supra, ____U.S. at ____, 95 S.Ct. at 1246; see United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972).

These principles are fully applicable to the instant case. While military personnel may suffer some impingements on normal First Amendments freedoms (see Parker v. Levy, 417 U.S. 733, 758 (1974)), they still retain a First Amendment right to

receive information and ideas. Moreover, in this case, civilians are seeking to exercise rights of expression, and substantial numbers of civilians are within the audience sought to be reached on the military post. Given the strong traditional aversion to prior restraints and the heavy presumption against their constitutional validity, only the most compelling demonstration of necessity -- one not made here -- can support any prior restraint. New York Times v. United States, supra. Preservation of military discipline and loyalty are valid objectives, but abuses of expression may be reached by the government after they occur. In the case of military personnel, Article 134 of the Uniform Code of Military Justice is available to punish speakers who materially interfere with discipline or loyalty. See, e.g., Parker v. Levy, supra; United States v. Priest, 21 USCMA 564, 45 CMR 338 (1972). Civilians, too, may be punished for speech which imminently jeopardizes valid governmental interests. Cf. Brandenburg v. Ohio, 395 U.S. 444 (1969). Thus, the normal First Amendment approach -- punishing abusive speech when, if, and after it takes place -- is fully applicable to an open military post.

This brief has argued that any prior restraint going to content of message is constitutionally impermissible on those many portions of Fort Dix which are accessible to the public and suitable for expresive activity. Point I, infra. To the extent that the primary use of the base for

military functions need be preserved, limitations on time, place, and manner of expression -- but not content -- may be imposed. But even if some form of prior restraint were found to be tolerable on an open military post, Fort Dix Regulation 210-27, ¶3 would still be constitutionally defective. For any prior restraint scheme must satisfy two conditions -- presenting precise and clear standards to guide the censor and guaranteeing procedural safeguards to ensure prompt review of the censor's determinations. Southeastern Promotions, Ltd. v. Conrad, ___ U.S. ___, 95 Sup. Ct. 1239, 1247 (1975). Fort Dix Regulation 210-27, ¶3 fails on both counts.

A. There Are No "Precise and Clear" Standards to Limit the Post Commander in Censoring Publications

"(A) law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority," is void. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969). (Emphasis added). Under Fort Dix Regulation 210-27, ¶3, the post commander may suppress any publication which he finds poses "a clear danger to the loyalty, discipline, or morale of troops." It is submitted that this standard, both on its face and as construed in the interpretive material mentioned above, is constitutionally deficient.

In the first place, this prior re-

straint regulation is not "narrow." In the context of a prior restraint, where the censor is speculating about the consequences which may flow from speech, a rigid clear-and-present-danger standard ought to be imposed. This means that the harm envisioned must be substantial and that it must be imminent. See Whitney v. California, 274 U.S. 357, 379 (1927) (Brandeis, J., concurring); Carroll v. Princess Anne, 393 U.S. 175 (1968); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Kiiskila v. Nichols, 433 F.2d 745, 751 (7th Cir. 1970); United States v. Priest, 21 USCMA 564, 570, 45 CMR 338, 344 (1972); United States v. Daniels, 19 USCMA 529, 535, 42 CMR 131, 137 (1970). Yet the "clear danger" standard of Regulation 210-27, ¶3 does not speak either to the magnitude or immediacy of the harm feared from the speech. Numerous publications critical of government policy, government officials, or the Army might well affect morale to some degree. But the Post Commander, in administering Regulation 210-27, ¶3, is not instructed to consider the magnitude of damage to morale, or its immediacy, in assessing the desirability of allowing a publication on the post. Moreover, morale is an intangible concept relating to ideas and attitudes. Permitting the commander to screen expression in order to preserve "morale" is idea and thought control. Under the rubric of morale, commanders may easily seek to insulate the occupants of a military post

(civilians as well as military personnel) from ideas that do not conform to prescribed official doctrine.

Nor is the "clear danger" standard "objective and definite" within the meaning of the Shuttlesworth test. The amorphous nature of the term "morale," and the room for subjective assessment of harm to morale which this regulation leaves, have already been mentioned. "Loyalty" is also a vague concept which has never been defined in the context of the regulation under consideration here. Cf. Baggett v. Bullitt, 377 U.S. 360 (1964). The vagueness of these terms, in combination with the failure of the regulation to require substantial and immediate harm, are sufficient to void the prior restraint. Unlike the case with Article 134 of the Code of Military Justice, the vague language here is not salvaged by established "customs and usages" giving specific content to the terminology.

Parker v. Levy, 417 U.S. 733 (1974), did indicate that because the military is "a specialized society" with "a separate discipline," the government may have some greater constitutional flexibility in prescribing rules which govern the activity of

military personnel rather than civilians. 417 U.S. at 743, 744, 756-759, supra. Levy expressed willingness to tolerate "areas of uncertainty" in a military code. But this case is significantly different from Levy. There, this Court dealt with provisions of the military code applicable to a full range of military conduct, while here the regulation in issue touches solely on expression. The Levy opinion conceded that a "greater degree of specificity" is appropriate in such a case. 417 U.S. at 752. Thus, in the context of a prior restraint upon pure speech, the government can be expected and required to narrowly and carefully define any speech sought to be suppressed. Moreover, the present regulation circumscribes the expressive activities of civilians, not just military personnel. Though there may be reasons why military personnel, as employees of the government subject to special duties and loyalties, may enjoy modified speech prerogatives. Parker v. Levy, 417 U.S. at 759, supra; cf. Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973); Alderman v. Philadelphia Housing Authority, 496 F.2d 164, 173-174, (3d Cir. 1974), cert. denied, 419 U.S. 844 (1974), such considerations do not apply where civilians are regulated, as is the case with Fort Dix Regulation 210-27, ¶3. Service regimentation cannot be imposed on the thousands of civilians who visit a military reservation; these persons cannot be asked to surrender their First Amendment

rights as they enter federal soil. Cf., Kinsella v. United States, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957). And civilians form a large part of the audience to be reached a Fort Dix. "(H)istory teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

The government's claim that considerations of military discipline and morale necessitate a broad prior restraint upon expression has no validity in the context of an open post in the United States where radio, television and all other forms of communication are readily accessible. No significant effort is made to censor material which arrives at Fort Dix through official outlets. Various media are permitted to reach soldiers without any effort to screen content to protect morale or loyalty. Moreover, a civilian entering Fort Dix can presumably convey any message he wishes by oral solicitation without having the content of that message screened in advance. It is only when that civilian seeks to circulate written material that the censorship machinery of Fort Dix Regulation 210-27, ¶3 is triggered. Given these leaks in the Army's efforts to screen communications from its personnel, the government's claim of military necessity for its present prior restraint machinery is unconvincing.

B. Appropriate Procedural Safeguards Are Entirely Lacking Under Fort Dix Regulation 210-27, ¶3.

To be valid, a prior restraint scheme must be accompanied by "procedural safeguards that reduce the danger of suppressing constitutionally protected speech." Southeastern Promotions, Ltd. v. Conrad, ____U.S.____, 95 Sup. Ct. 1239, 1247 (1975); see Freedman v. Maryland, 380 U.S. 51 (1965). Specifically, the government censor must undertake the burden of procuring a prompt judicial affirmation of any decision to suppress expressive material. This adversary proceeding is necessary for "assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." Carroll v. Princess Anne, 393 U.S. 175, 183 (1968). See Collin v. Chicago Park District, 460 F. 2d 746 (7th Cir. 1972); Le Flore v. Robinson, 434 F.2d 933 (5th Cir. 1970), vacated on other grounds, 446 F.2d 715 (5th Cir. 1971). A court is presumed to be more sensitive and responsive to free speech claims than administrative officials. See Southeastern Promotions, Ltd. v. Conrad, supra, ____U.S. at _____, 95 Sup. Ct. at 1247-48.

Under Fort Dix Regulation 210-27, ¶3, no procedural safeguards are provided. The post commander first makes an ex parte determination to suppress a publication. Any publication is then delayed for an indeterminate period while Army Headquarters is

informed of the suppression. A.R. 210-10, ¶5-5(c). No mechanism is provided for any adversary proceeding either within or without military channels. No burden of proof, or even burden of going forward, is placed on the post commander.

There is a grave danger that a post commander, attuned to considerations of Army discipline and order but unschooled in the dictates of the First Amendment, will have a tendency to find dangers to morale or loyalty in proposed publications. See Note, 73 Colum. L. Rev. 1089, 1104 (1973); cf. Southeastern Promotions, Ltd. v. Conrad, supra, at 1247-48. Certainly, some type of proceeding ought to be required at which the Commander can at least be exposed to arguments in favor of permitting publication. Moreover, a judicial source -- conversant with constitutional strictures -- ought to be available to pass on the validity of a suppression decision. (Presumably, a military tribunal would suffice despite some hazards of command influence). In the absence of such procedural safeguards, Fort Dix Regulation 210-27, ¶3 cannot be permitted to stand.

III.

FORT DIX REGULATION 210-26 ¶2(a), FORBIDDING ALL POLITICAL SPEECHES OR RALLIES ON THE RESERVATION, VIOLATES FIRST AMENDMENT GUARANTEES OF FREE SPEECH.

Fort Dix Regulation 210-26 ¶2(a) reads:

> Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

This provision was applied by Commander David to exclude Respondent Spock, then a candidate for the Presidency, from conducting a campaign rally on the Fort Dix Reservation. See also, A.R. 360-61 ¶ 2-2 forbidding Army participation or cooperation in any civilian activity which might benefit or appear to benefit a political group and A.R. 600-20, 5-16 prohibiting partisan political activity by any serviceman.

The government contends that the above policy is necessary to preserve the reality and the appearance of political neutrality of the Army. The Third Circuit Court of Appeals branded the Army's policy "feigned neutrality" and asserted that it "stretches credulity to assume that permitting such [evenhanded] use would be an endorsement or selective benefit." Spock v. David, 469 F.2d 1047, 1055-56 (3d Cir. 1972). The Court emphasized that the practical effect of the regulation is to exclude only minor party candidates from access to the 28,000 Fort Dix occupants, for mass media enables major party candidates to reach the post's occupants. Id. at 1056.

The Third Circuit's determination is eminently sound. First Amendment interests dictate that suitable public areas of Fort

Dix be available for orderly communication and expression. (See, Point I, infra). And once a forum is made available for speech purposes, the Constitution also dictates that access to the forum be administered in an evenhanded, non-preferential fashion. See Police Department, City of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Distinctions in terms of subject matter -- e.g., political v. non-political speech -- are ordinarily not permissible; government "may not select which issues are worth discussing or debating in public facilities." Id. at 96. Thus, if the Army permits use of post facilities for a political speech, it is merely honoring the evenhanded policy of access for expressive activity which the Constitution compels. If this constitutionally required approach is followed, the Army's identification with any particular cause will not be possible and, so long as its administration of facilities is evenhanded, its political neutrality cannot be questioned. See generally Jenness v. Forbes, 351 F.Supp. 88, 100-01 (D.R.I. 1972). The Army is no more identified with a party's cause at a political rally than it is identified with a cause espoused on leaflets permitted to be circulated on a post. The Army's articulated fear of losing neutrality thus represents the kind of undifferentiated fear which cannot be used to justify selective exclusion of a particular type of speech from a public forum. See Police Department, City of Chicago v. Mosley, supra, 408 U.S. at 101; Tinker v. Des Moines Independent Community School District,

393 U.S. at 508.

Petitioners refer to problems of administration and appearances of favoritism as justifying exclusion of political meetings from Fort Dix, citing Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) for support. In Lehman, this Court sustained the exclusion of political advertising from posters on a municipal transit system, and the opinion did refer to "lurking doubts about favoritism, and sticky administrative problems. . .in parcelling out limited space to eager politicians." Id. at 304.

Lehman is, however, distinguishable from the instant case in several respects. In the first place, Lehman dealt with limited resources -- poster space on a streetcar -- which numerous candidates could be expected to utilize. It is improbable that federal reservations will be deluged with requests for campaign or rally space. More importantly, Lehman dealt with a captive audience, in circumstances where political messages would be inflicted upon the transit passenger. "The streetcar audience is a captive audience." Id. at 302. That element -- presence of a captive audience -- was crucial to the decision, as the concurring opinion of Justice Douglas makes clear. Id. at 307. See also Chicago Area Military Project v. City of Chicago, 508 F. 2d 921, 926 (7th Cir. 1975). Finally, the transit system in Lehman did not present the kind of open spaces or public thoroughfares suitable for political ex-

pression. Lehman v. City of Shaker Heights, supra, 418 U.S. at 303. Fort Dix clearly does have, within its 55 square miles, areas suitable for such expression. Pursuant to court order, Respondent Spock did hold one rally on the reservation without difficulty. And the post recently accommodated 100,000 visitors on one weekend. See Newark Star Ledger, June 16, 1975, at p. 8, col. 6. "Just as Tinker made clear that school property may not be declared off-limits for expressive activity by students," Grayned v. City of Rockford, 408 U.S. 104, 118 (1972), the generally open areas of military installations may not be declared "off-limits" for expressive activity by soldiers and civilians.

Jenness v. Forbes, 351 F.Supp. 88 (D. R.I. 1972), illustrates both the suitability of a post for political activity and the feigned neutrality which the Army is seeking to preserve. There, the District Court initially upheld the constitutionality of a military ban on political rallies. But the military post was then made available as a campaign stop for Vice-Presidential candidate Agnew, and the court revised its opinion and ordered the post to be made available to candidate Jenness for a campaign meeting. The court commented:

> The Agnew visit poignantly emphasizes the validity of plaintiffs' argument that they, as minority party members, are denied access to channels of communication available to the two major parties,

> richer in resources of wealth, connections, and prestige.
> 351 F. Supp. at 100.

The Third Circuit Court of Appeals has also amply documented the difficulty and expense entailed in minor candidates reaching the 28,000 occupants of Fort Dix if direct access is denied. See Spock v. David, 502 F.2d 953, 956 (3d Cir. 1974). There is no demonstrable governmental interest which justifies isolating the approximately 28,000 Fort Dix occupants from the message of political candidates outside of the two major parties. To the extent that primary use of a military post and non-interference with military functions must always be preserved, the lower courts have provided for limitations on time, place and manner of political rallies which ensure the protection of these valid governmental interests.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

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